"REPORTABLE"

A 3/2012

SUMMARY

H versus ***D***

DAMASEB, JP

2012.01.27

Application sought on urgent basis to seek interim order of variation of an extant custody order;

Court will only interfere if applicant establishes to Court's satisfaction that the custodian-parent abusing power of custody over minor.

"REPORTABLE"

CASE NO.: A 3/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EH **APPLICANT**

and

D

(Previously H) **RESPONDENT**

CORAM: DAMASEB, JP

Heard on: 20 & 25 January 2012

Delivered on: 27 January 2012

JUDGMENT

DAMASEB, JP [1] The applicant seeks the following relief:

"1. The dispensing with the forms and service and compliance with the time limits prescribed by the Rules of this Honourable Court, as far as may be necessary, and condoning Applicants's failure to comply therewith and directing that this matter be heard as one of urgency as envisaged in Rule 6(12) of the Rules.

2. That a rule nisi do issue calling upon the Respondent to show cause, if any, to this Honourable Court on a date to be determined by this Honourable Court, why an order shoudl not be made in the following terms::

2.1 Granting the Applicant interim custody and control of the minor child, "H", pending the finalization of an application for the variation of the terms of the Final Order of Divorce granted in case number (I) 589/2003, which application shall be launched within 30 days from date of this order.

2.2 Directing that the Respondent shall have access to the minor child, “H”, every alternative weekend, every alternative long and short school holiday and at any other time to be agreed between the parties in advance.

2.3 Directing that the said minor child, “H”, shall continue her secondary education at Delta School in Windhoek and remain in the Applicant’s custody and control until finalization of the application referred to in paragraph 2.1 above.

2.4 Interdicting and restraining the Respondent from removing the said minor child, “H”, from Delta School until such time as the application referred to in paragraph 2.1 above is finlised.

2.5 Directing that the Respondent pay the costs of this application in the event that it is opposed.

3. That the order in terms of sub-paragraphs 2.1 and 2.4 hereof shall serve as an interim interdict with immediate effect pending the finalisation of this application.

[2] The two protagonists in this case, which comes to this Court by way of an urgent application primarily seeking urgent interim relief granting custody and control of a minor child to the non-custodian parent, were divorced on 26 January 2004. The applicant deposed a founding affidavit and has since replied. The respondent filed an answering affidavit opposing the relief sougt by the applicant. I do not propose to set out the averments of the deponents separately but, having considered them all, next set out the material facts of the case as appear from the undisputed facts and those facts se up by the respondent which I am bound to accept based on the *Plascon-Evans* formula: that where there are disputes of fact and there is no resort to oral evidence, the court relies on (i) the applicant’s undisputed facts and (ii) the facts set

up by the respondent unless they are so inherently implausible or far-fetched that they can be rejected on the papers.[1]

[3] In 2003, the applicant and the respondent had, in contemplation of the divorce, entered into a settlement agreement which was made an order of court, *inter alia* granting custody and control over the two minor girls of the marriage to the respondent; and over the than minor boy ("X"), to the applicant. The boy lived with the applicant until 2005 , completed schooling, became a major and is since living on his own. The eldest girl is now 20-years-old, and having completed secondary schooling in Namibia, is now attending university in South Africa. All three children attended school at the predominantly German-speaking school, Delta, here in Windhoek. Both parents are German-speaking and prefer a school where that language is the medium of instruction. The two parents had also attended and completed scool at Delta.

[4] I shall hereafter refer to the minor girl who is the subject of the present dispute as "H". At the time the parents divorced H was 7 years old. Now she is a budding teenager of 15 years. It is common cause that she is a very social person that makes friends very easily; has a close circle of friends here in Windhoek around whom her live revolves; is very close to her elder male sibling ("X") - yet is very impressionable. She had since her parents' divorce lived with the respondent who, like the applicant, was employed at Nedbank here in Windhoek. The respondent who had since remarried, resigned her job in the first part of 2011 to prepare for a move to a farm of the new husband's family, and at that stage left H in the care of the applicant who now lives in a stable – and it is not disputed - loving relationship with a new partner

[1] *Bailey v Bailey*, 1979 (3) SA 128 (A) at 132H; *Van Oudenhove v Gruber*, 1981 (4) SA 857at 856 8 D-E(A).

with whom “H” has also developed a rapport and shares an interest in photography. The three of them get along very well and she feels loved and welcome in the applicant’s home.

[5] In October 2011 the respondent came to Windhoek and informed the applicant that she intended to move “H” to Otjiwarongo where she would live in a hostel and attend scool at a school comparable to Delta, also predominantly German-speaking. It is an understatement that the applicant does not like this change in “H”’s circumstances. He believes that “H” has adjusted well living with him and his new partner and takes the view that it is preferable for “H” to live with one of the biological parents instead of being placed in a hostel as she had since she started school life never lived in a hostel and that such an environment would not be in her best interests. He feels that the respondent has taken this decision as punishment for “H” whom she feels is not performing well at school. Much as the respondent wants to down-play its significance, it is quite apparent from the papers that “H” is very upset by this change in her circumstances and does not want to move to Otjwarongo.

[6] “H” spent the December 2011 vacation with the respondent having been taken from the applicant. “H” was collected from the applicant’s home on 2 December. During this period “H” went with the respondent and her new family to settle-in “Y”, “H”’s elder female sibling, at a university in South Africa. When they returned from South Africa on or about 5 January, “H” was asked by the respondent to pack her belongings then at the applicant’s home, as she was now moving to Otjiwarongo. The applicant makes it clear – and there really cannot be any serious dispute about it from the papers – that “H” resents the move and has asked him to stop it by seeking legal redress. That is what brings the applicant to this court. He sought legal advice

and also commissioned a report of an educational psychologist (Ms Brand) who deprecates the move for “H” to a hostel as not being in her best interests. The applicant wants to be granted temporary custody over “H” pending his bringing an application to vary the extant custody order over “H”.

[7] This court is upper guardian of minor children. It can, if the circumstances justify (i.e if it is in the best interests of the child) , vary a custody order in favour of the non-custodian parent. That is so because a custody order is not a final order.[2] It is perfectly legitimate for the non-custodian parent to approach this court to change a custody order if they have a basis for believing that it is in the best interests of the minor child. The minor child is entitled to protection from the custodian parent if the latter is acting against its best interests. What is in the child’s best interests will of course depend on the circumstances of each case. After he was told in October 2011 by the respondent about her intention to move “H” to Otjiwarongo, the applicant consulted a lawyer and engaged the services of an educational psychologist, the latter recommending that he be awarded temporary custody. That report was received in the first part of November and also availed to the respondent. The applicant consulted lawyers on 11 November and brought the present application on 16 January 2012. School started on 17 January and “H” is already in a hostel in Otjiwarongo and still expects the applicant to reverse the respondent’s decision.

Urgency

[2] *Abrahams v Abrahams,* 1981 (3) SA 593 at 597F – 598.

[8] The respondet says this application is not urgent. It was asked by her counsel during argument, why it was not brought already last year at the time when the applicant became aware that the decision of the Respondent to move H to Otjiwarongo was final; or immediately after the expert's report became available; or after 9 November, the date on which he had threatened through his lawyers to bring an urgent application if the respondent did not desist from moving "H" to Otjiwarongo. That is all very well and might be an approach that commends itself in commercial or kindred matters. The present proceedings are *sui generis* and invoke a special jurisdiction bestowed on this court to look after the interests of children - even before the coming into force of the Namibian Constitution which quarantees children the right to be cared for by their parents.[3]

[9] The pedandic approach requiring an applicant seeking urgent relief to meticulously explain the reason for every delayed action in coming to court should not be encouraged in proceedings such as the present. No doubt, there will be circumstances where the facts are such that a delay in coming to court to ventilate issues affecting children's rigths is palpably unreasonable and oppressive that the court would refuse to come to the assistance of an applicant on an urgent basis, but this is not such a case.

[10] I do not find it necessary to devote a great deal of time considering the dispute that has arisen whether this matter is urgent. Even if I am to be persuaded, which I am not, that the applicant delayed bringing this application, I do not think- based on what is now disclosed in the papers about "H"'s attitude towards her relocation to Otjiwarongo, this Court should, as her upper guardian (exercising its discretion to

[3] Article 15 of the Namibian Constitution

entertain or not matters of this kind) allow that to prevent the ventilation of the question: is "H"'s relocation to Otjiwarongo in the circumstances disclosed in the papers in her best interests – justifying a temporary variation of the custody order, pending a substantive application to be brought by her father and joint- legal guardian to vary the terms of the variation order granted by this court when her parents divorced? It is common cause that the minor who is the subject of this application has been in the custody of the respondent since 2 December 2011. The application was served on the respondent on 16 January 2011.

[11] The applicant makes the allegation that the minor child is unhappy about having been moved from Windhoek to Otjiwarongo by the respondent and had asked him to do something about it as she was not happy with the move to Otjiwarongo. It is very clear on the papers that "H" had become resentful of the respondent as a result of being moved to Otjiwarongo. I have no reason to believe that it is going to remain that way for good. But that is the present circumstance. It is really spurious in the circumstances to rely on alleged inaction by the applicant to bring the application a week or two (or even a month) earlier than he did: He gives a very detailed and *bona fide* explanation of all the steps he had taken to consult a lawyer and an educational psychologist; and how he acted on advice as to the timing of the court proceedings. This application is not one where he seeks some personal financial gain at the expense of the respondent. He says - and it is not disputed – that he wants to vary an existing court order 'in the best interests' of his own child who is asking him for help. If the applicant were making all this up, it would have been the easiest thing for the respondent to say so and to have it confirmed by "H" who after all is in her custody since 2 December and certaily at the time she was preparing the answering papers She does not!

[12] In the circumstances, I exercise my discretion to entertain the application as one of urgency as contemplated in rule 6(12) and accordingly dispense with the forms and service and compliance with the time limits prescribed by the Rules of Court and condone the applicant's failure to comply therewith.

The requirements for an interim interdict pendente lite

[13] To succeed in these proceedings, the applicant must establish a clear right worthy of protection and that he would not get substantial redress in due course. He must demonstrate that he has a well– grounded apprehension of irreparable harm which can only be cured by an interim interdict and that the balance of convenience favours him. He can also succeed even if he does not establish a clear right - as long as such right is prima facie established but open to some doubt.[4]

Right relied on

[14] The applicant wants to vary the part of the final order of divorce that granted the respondent custody and control over "H". He intends to file an application in due course in that respect. He now wants this court to grant him temporary custody pending that application. The applicant predicates the need for variation on temporary basis on the best interests of "H". He relies on the fact that when the present custody order was made the entire family lived in Windhoek and the children were able to attend the same school and there was not much disruption in their lives - except for the obvious and ineluctable reality that divorce meant separation of the family in the way already shown. The respondent has since re-married and has two new children with the new husband, resigned her job in Windhoek and now lives on a

[4] *Rossing Uranium Ltd v Cloete and another*, 1999 NR 98 at 100E-F; *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd & Others* 2001 (3) SA 344 at 353 E-J – 354 A-C.

farm 160 km from Otjiwarongo. Since April 2011 “H” came to live with the applicant as designed by the respondent, and he has since then assumed the responsibility of caring for “H”’s educational and material needs on a day-to-day basis. “H” is happy with him and wants now to live with him and this new reality cannot just be changed by the respondent. The respondent wants to punish “H” by moving her to Otjiwarongo on account of respondent’s perception - which he says is not well-founded- that “H”’s grades have declined since she moved in with the applicant. “H” does not want to go to Otjiwarongo and resents the respondent for initiating that move. “H” has a very close circle of friends in Windhoek and it is to her detriment to suddenly cut her off from her friends and family she had since become close to. “H” had never lived in a hostel before and had always lived with one of the biological parents and being placed in a hostel is to H’s detriment. It is in “H”’s best interests for her to live with a parent instead of being placed in a hostel.

The onus and test for variation of a custody order

[15] It is settled law that the custodian parent enjoys the right to regulate the minor child’s life, including where it lives and attends school - and to bring about changes in those aspects of the child’s life. The court will only interfere with that power where the power is being abused and is not being exercised in a way that is in the child’s best interests.[5] In *Niemeyer* (at 76 and 79) the court said:

> ‘Unless...the divorced parents or separated spouses can agree upon a policy for the minors, where a difference of opinion has arisen, the will of the custodian-spouse must prevail unless the dispossed spouse can satisfy the court that a case for its intervention in the interest of the minors has arisen.’

[5] *Edge v Murray, 1962 (3) SA 603; Niemeyer v De Villiers*, 1951 (4) SA 100 (T).

> 'The parent seeking variation must on a balance of probabilities show that the custodian –parent is in exercise of teh power of control and direction of the child's life and person acting to its detriment.' *Van Odenhove v Gouber,* 1981 (4) 857 at 868 B.

[16] The child's personal preference is entitled to consideration, and its weight will depend on the age of the child: *French v French* 1971 (4) SA 298 (W) at 299 (H). A child's existing environment should not readily be disturbed. As Broom J said in *Dusterville v Dusterville* 1946 NPD 594 at 597:

> 'A child needs, from the earliest dawn of intelligence, a stable background, if it is to have the best prospect of developing a stable character. Changes of environment, unless they are unavoidable, are therefore to be deprecated, especially where they involve an interruption of intimate personal relationships.'

[17] As I have demonstrated, the case for intervention only arises where the custodian- parent exercises the power of custody and control for an ulterior motive and acts capriciously and whimsically, unconcerned with the best interests of the minor child. I must add a rider here: It is not the case that as long as the custodian-parent's actions are devoid of any of these vices and he or she seeks to do what they perceive as the best interests of the child, their actions will be beyond the scrutiny of this court. The best interests of the child remains the dominant and overarching consideration. (*Fletcher v Fletcher* 1948 (1) SA 130 (AD) at 144.)

[18] It is conceivable, therefore, that however well-intentioned the custodian-parent, there will be circumstances that the best interests of the child dictate that the wishes of the custodian-parent be overriden. As was said by Young J in *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) (at 261H):

> 'The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also beregarded and in the case of older children their wishes in the matter cannot be ignore'.

[19] In none of the allegations he makes, except the reference to an alleged desire to punish "H", does the applicant allege and provide even the most modicum of proof that the respondent is acting with a motive unrelated to the best interest of "H". It may well be so that the respondent feels "H" is having far greater freedom than the respondent feels is warranted for her age , and that a hostel environment would curb that and in that way to 'punish' "H" - but that is no basis for the conclusion that what motivates her is the best interests of "H". It is at times necesssary for parents to do that sort of thing. I am not here dealing with a mother who (as in *Seimleit v Cunliffe,* 1940 TPD 67) wished to change a child's environmet in order to get to the father over some dispute relating to maintenance payments or other simmering issues between divorced spouses. Instead, I am dealing with a mother who , on the common cause facts and those that I must accept on the *Plascon-Evans* test, arranges a meeting with the applicant and informs him of her intention to move "H" to Otjiwarongo and seeks his support; visits "H"'s present school and informs them of the move; visists schools in Otjiwarongo and checks them out for suitability and settles on a particular school; meets "H" with her other sibling ("X") and informs both about her intentions; makes clear that she is worried by the behaviour of "H" who overdoes make-up and wears mini skirts and spends too much time at malls and on facebook; and wants a more controlled environment for H which comes with hostel life.

The law to the facts

[20] In the present case it does appear to me that the respondent takes a very rigid and rather formal approach to what she is entitled to do do as a custodian-parent and

displays, on the face of it, what appears to be scant regard for the wishes of the applicant, and most importantly, “H”. “H” is now a 15-year-old girl and it is foolhardy to simply ignore her wishes.

[21] I have , however, at this stage of the proceedings decided to give precedence to the respondent’s wishes for the foolowing reasons: Although the expert commissioned by the applicant concludes that it is to “H”’s detriment to alter her present circumstances, that report admittedldly does not have the respondent’s input and there can be no knowing how it would have changed if it did - especially if regard were had to the concerns of the respondent as earlier shown. Although it seems that H has developed a negative attitude towards the respondent, I am unable to say if it is not a transient phenomenon that will heal with the passage of time - and I take into account the respondent’s averment in answer that she had since apologised to “H” and that the two of them are getting along and that H had since made new friends at the new scool and is adjusting. Of course, when the substantive application is brought in due course these issues will be more properly and objectively evaluated and in that context one will be able to determine – regardless of the wishes of the respondent as custodian-parent - what is in the best interests of “H”. It must be accepted that “H”’s grades have declined as alleged by the respondent and that the permissive approach to parenting adopted by the applicant may have something to do with that.

[22] I am also satisfied that the respondent, in placing “H” in the care of the applicant since April 2011, did not by so doing abdicate her role as custodian-parent and in effect passed it on to the applicant.[6]

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[6] *Jonson v Johnson, 1963 (1) SA 162 (T).*

Application fails

[23] I come to the conclusion, based on the common cause facts and the facts set up by the respondent, that the applicant did not establish to my satisfaction and on a balance of probabilities that the respondent's decision to move "H" to Otjiwarongo was actuated by motives other than the best interests of "H". The application must therefore fail at this stage.

Costs

[24] I find no evidence on the papers that either parent in this litigation (unfortunate as it is) is actuated by anyting other than what each perceives to be the best interests of "H". Neither stands to gain financially and it is quite obvious they have incurred substantial costs in seeking to ventilate the best interests of "H". I think it would be inappropriate at this stage of the proceedings to require either to bear the costs of the other. In the exercise of my discretion, therefore, I prefer that each pay their own legal costs. There is accordingly no oder made as to costs.

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DAMASEB, JP

ON BEHALF OF THE APPLICANT: Mr. H. Geier

Instructed By: **Koep & Partners**

ON BEHALF OF THE RESPONDENT: Mr J Schickerling

Instructed By: **Francois Erasmus & Partners**